93-954

Supreme Court, U.S.
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No. _____

SUPREME COURT OF THE UNITED STATES
October, 1993 Term

PAULA TSACONAS, DOUG BURBECK, JOSEPH J. JAN LOIS, JR., CHANNING JONES III, JAMES H. KARLS, MILTON KRAMLICH, JOHN LEE, HAROLD J. MYERS, NAMAQUA LIMITED PARTNERSHIP, NOVA COM PARTNERS, JOHN PANOZZO, SIERRA COM PARTNERS, ARNOLD LEONG D/B/A SOBRANTECH, HELLA TSACONAS, WARREN HAVENS, KENNETH MERIN, AIR CABLE LIMITED PARTNERSHIP

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petition for Writ of Certiorari.

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QUESTIONS PRESENTED FOR REVIEW

Did the Federal Communications FCC ("FCC") violate Fifth Amendment procedural due process rights of Petitioners by conducting a criminal investigation of them while simultaneously adjudicating their rights in a civil administrative proceeding when Congress has granted no authority to the FCC to conduct criminal investigations?

Did the FCC violate Petitioners' Fifth Amendment equal protection rights by classifying them as an "Application Mill" and making them part of its effort to eliminate "Application Mills" through adjudications in which the FCC made findings that Petitioners violated the FCC's rules?

If the FCC violated Petitioners' procedural due process and equal protection rights, did such

constitutional violations create an exception to the exhaustion of administrative remedies doctrine, enabling the lower court to exercise jurisdiction over appllants' cases?

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REFERENCE TO OFFICIAL OR UNOFFICIAL REPORTER

None of the decisions issued by the U.S. Court of Appeals for the District of Columbia Circuit or the Federal Communications Commission are published in an official or unofficial reporter.

CONCISE STATEMENT OF GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED

This Court has jurisdiction under 28 U.S.C. §1254(1) which provides, "Cases in the court of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgement or decree."

The U.S. Court of Appeals for the District of Columbia Circuit dismissed Petitioners' appeal on June 29, 1993 and denied a Petition for Rehearing on September 10, 1993.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

United States Constitution, Fifth Amendment.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

CONCISE STATEMENT OF THE CASE

Mr. Warren Havens is the owner of Sierra Communications, a business involved in the development of radio communications systems licensed by the FCC. Mr. Havens established client relationships with other individuals interested in communications-related businesses. One such business involves Multiple Address Systems ("MAS"). In such systems, data is transmitted on frequencies in the 900 MHz band to and from a "master" station and several "remote" stations scattered throughout the service area.

The FCC, through its Private Radio Bureau ("Bureau"), accepts applications for MAS construction permits. Mr. Havens, on behalf of himself and sixteen clients, prepared and filed MAS applications with the Bureau. The

applications were filed during January and February, 1992.

By letters sent in February and March, 1992 [hereinafter the "February-March Letters"] the Chief of the Bureau's Microwave Branch ("Branch Chief"), began dismissing Petitioners' applications. The Branch Chief sent individual dismissal letters to the Petitioners stating that the applications were defective because "[i]t is apparent from studying [the engineering] analyses that they are photocopied and the frequencies requested have not been certified in original form by your frequency coordinator as required by Rule 94.63." The Petitioners affected by the February-March Letters thereafter filed petitions with the Bureau seeking reconsideration of the dismissals, arguing that the FCC's rules do not require a frequency

certification to be "certified in original form."[1]

By letters sent in April, 1992 [hereinafter the "April Letters"], the Branch Chief issued letters dismissing the remainder of the MAS applications prepared by Mr. Havens. Unlike the February-March Letters, the April Letters alleged that "unauthorized changes" had been made to the frequency coordinations contained in the MAS application and "had been tampered with," and that the applications lacked valid frequency coordination. The Petitioners affected by the April Letters thereafter filed petitions with the Bureau seeking reconsideration of the dismissals, arguing that the allegation of

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[1] The rule requiring certification of frequencies is actually 47 C.F.R. §94.15(b)(1), not Rule 94.63 as stated in the dismissal letters.

"tampering" was meritless.

On June 10, 1992, counsel for the Petitioners telephoned the Licensing Chief who stated that he was working with the General Counsel to decide to what extent to coordinate with the Justice Department in these cases. Counsel asked the Licensing Chief for the basis for the Justice Department's involvement. The Licensing Chief responded that the FCC felt that the applicants had made a representation of frequency coordination at the time of filing which was not true.

As of June 10, 1992, the Petitioners thus were aware that they were the subject of an FCC criminal investigation, and possible prosecution by the Justice Department, based on allegations of "tampering" with, or otherwise misrepresenting, the frequency coordination showings made in their

license applications. In the proceedings below, Petitioners made specific allegations that the FCC was engaged in a criminal investigation and prosecution of Petitioners in coordination with the Justice Department. The FCC never addressed such allegations.[2]

On August 7, 1992, counsel spoke again with the Licensing Chief by phone. The Licensing Chief indicated that, following his meeting with the Branch Chief, the Bureau's position was "still" that the applications were part of an

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[2] Appellants' allegations regarding a criminal prosecution were made in their March 15, 1993 response to the FCC's motion to dismiss appellants' petition for review before the United States Court of Appeals for the District of Columbia Circuit. The allegations were supported by a declaration made under penalty of perjury by appellants' counsel who confirmed the Licensing Chief's statements. The FCC's March 19, 1993 reply to appellants' response was totally silent regarding these allegations.

"application mill" and lacked proper frequency coordination. Counsel asked the Licensing Chief for the definition of an "application mill." The Licensing Chief responded, "We both know what that means." The Licensing Chief also stated that reinstatement of the applications was "rather slim."

By letters sent on August 25, 1992 ("August Letters"), the Licensing Chief requested a detailed explanation of the frequency validation process followed with respect to Petitioners' applications. It should be emphasized that the August letters were sent subsequent to the Licensing Chief's statements about coordinating with the Justice Department regarding Petitioners' alleged misrepresentation of frequency coordination.

Petitioners responded to the August

Letters by filing a joint supplement to their petitions.

During this period, the Bureau Chief and an FCC Commissioner expressed their general views concerning "applications mills." On April 29, 1992, the Bureau Chief gave a speech deriding "application mills," i.e. people who are "active in the business of preparing applications for the benefit of third parties who have no connection with the communications business aside from a strong desire to get rich quick with no effort." (Ralph A. Haller, Chief, Private Radio Bureau, Speech to Land Mobile Communications Council, April 29, 1992)

Soon thereafter, in a speech given on June 24, 1992, an FCC Commissioner mentioned the Private Radio Bureau Chief's speech, and echoed the Chief's attitude about "application mills,"

stating: "The application mills, I fear, have proven extremely adept at overcoming almost every obstacle we throw their way --- and will always show such perverse aptitude." (Ervin S. Duggan, Commissioner, Federal Communications Commission, Speech to American Mobile Telecommunications Association SMR Leadership Conference, June 24, 1992.) The full Commission expressed similar feelings about "application mills" in a Memorandum Opinion and Order released in July, 1992 concerning the narrowband 220-222 MHz service licensed by the Bureau. There, the FCC justified "good cause" for shortening the Federal Register notice of the application filing window:

> ...[W]e note that through the Report and Order, we expressed our concern that a deluge of applications would be filed by speculators and so-called "application mills" seeking not to develop bona fide narrowband

> systems but to obtain access to spectrum that could later be sold for a profit. [footnote omitted]. (Memorandum Opinion and Order, In the Matter of Amendment of Part 90 of the Commission's Rules . . ., Adopted June 18, 1992, Released July 16, 1992)

In sum, the FCC's attitude regarding "application mills" was expressed consistently by the Private Radio Bureau's processing staff, the Private Radio Bureau's Licensing Chief, the Private Radio Bureau's Chief, at least one individual FCC Commissioner, as well as by the full Commission during the processing of the MAS applications prepared by Mr. Havens.

By letters dated December 15 and 16, 1992 ("December Letters"), the Licensing Chief denied Petitioners' petitions.

On January 14, 1993, Petitioners filed separate notices of appeal with the United States Court of Appeals for the

District of Columbia Circuit. Jurisdiction was based upon 47 U.S.C. §402(c). The cases were consolidated under Case No. 93-1032.

On March 5, 1993, the FCC's Office of General Counsel filed a motion to dismiss the cases on the ground that the Petitioners had not exhausted administrative remedies pursuant to 47 U.S.C. §155(d)(7) by filing an application for review of the Bureau's December Letters dismissing their applications. Petitioners filed a response to the motion to dismiss, and the FCC filed a reply. The court granted the motion on June 29, 1993, holding that Petitioners' arguments did not support their contention that they were not required to exhaust their administrative remedies prior to seeking judicial review. The court denied Petitioners'

petition for rehearing on September 10, 1993.

DIRECT AND CONCISE ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. Introduction.

This case involves important questions of federal law which have not been, but should be, settled by this Court. The questions are: (1) did the FCC's conduct of a criminal investigation and prosecution of Petitioners during the pendency of the FCC's adjudication of their license applications violate Petitioners' procedural due process rights guaranteed by the Fifth Amendment of the Constitution?; (2) did the FCC's labelling of Petitioners as an "application mill" during the adjudication of their license applications deny Petitioners equal protection of the laws guaranteed by the Fourteenth Amendment of the

Constitution?; and (3) if Petitioners' due process and equal protection rights were violated, did such a violation provide a basis for an exception to the doctrine of exhaustion of administrative remedies?

These questions are one of first impression of this Court. Their importance is highlighted by the fact that the FCC is the agency of the Federal Government authorized to issue licenses to individual persons and businesses for the use of the radio spectrum. The proper and constitutional exercise of the FCC's licensing function is of growing importance due to society's increasing reliance on wireless communication services.

II. The FCC's criminal investigation in conjunction with a civil adjudication violated Petitioners' due process rights.

Whether the FCC should be permitted to conduct criminal investigations of applicants appearing before it implicates due process concerns which this Court should address. Not to undertake a review of these issues would allow the FCC, and other similarly situated agencies, free reign to engage in criminal investigations of applicants before the agency.

In Withrow v. Larkin, 421 U.S. 35 (1975), this Court addressed whether a combination of criminal and civil functions necessarily creates a risk of bias in administrative adjudication, in turn violating the procedural due process rights of individuals appearing before the agency. This Court stated:

> Not only is a biased decisionmaker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness." In re

> Murchinson, supra, at 136; cf. Tumey v. Ohio, 273 U.S. 510, 532 (1927). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.

Withrow, 421 U.S. at 47 (footnotes omitted). This Court indicated that the individual alleging that a combination of functions creates an unconstitutional risk of bias in administrative adjudication must overcome:

> . . . a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id. However, this Court also stated:

> That is not to say that there is nothing to the argument that those who have investigated should not then adjudicate. The issue is substantial, it is not new, and legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons.

Id. at 51-52.

As Withrow suggests, this Court's review of the constitutionality of a combination of functions performed by administrative agencies relies upon the agency's legislative authority. In Withrow, the state statute specifically delineated the civil adjudicatory and criminal prosecutorial functions of a state board and authorized their combination. Withrow, 421 U.S. at 37-38. Accordingly, the authorizing statute of a board or agency is a guidepost for determining whether a combination of

functions, and in particular a combination of civil and criminal functions, is permissible.[3]

In United States v. LaSalle National Bank, 437 U.S. 298 (1978), this Court addressed whether Congress had authorized the use of administrative summonses in investigating possible criminal violations of the Internal Revenue Code. This Court concluded that Congress by statute had authorized the Internal Revenue Service ("IRS") to use administrative summonses for the purpose of investigating criminal conduct. This Court found that Congress had not categorized tax fraud investigation into civil and criminal components but created a tax enforcement system in which

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[3] See, e.g., Ciechon v. City of Chicago, 686 F.2d 511, 522 n.14 (7th Cir. 1982).

criminal and civil elements are "inherently intertwined." The Court also found that a rule was in place whereby the IRS could issue an administrative summons only before it recommended criminal prosecution to the Department of Justice, thus protecting the standards of criminal litigation discovery. Id. at 308-311.

The Government may pursue either civil remedies or criminal sanctions "if statutory provisions permit." U.S. v. Professional Air Traffic Controllers, 653 F.2d 1134, 1142 (7th Cir. 1981). Under present law, it is the function of the Justice Department and the Federal Bureau of Investigation, not other departments or agencies, to investigate and prosecute criminal acts against the United States, unless "investigative jurisdiction has been assigned by law to such departments

and agencies." 28 U.S.C. §533 (1993).[4]

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[4] The full text of 28 U.S.C. §553 (1993) provides:

> The Attorney General may appoint officials --
> (1) to detect and prosecute crimes against the United States;
> (2) to assist in the protection of the person of the President;
> (3) to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.
>
> This section does not limit the authority of departments and agencies to investigate crimes against the United States when investigative jurisdiction has been assigned by law to such departments and agencies.

Examples of federal agencies which have been assigned investigative jurisdiction include the Treasury Department (26 U.S.C. §§7801, 7803), the U.S. Coast Guard (14 U.S.C. §2) and the Secret Service (18 U.S.C. §3056). Without statutory authority, it is improper for an agency to determine criminal questions in the context of a civil action. United States v. Jalas, 409 F.2d 358, 360-361 (1969).

The purpose of civil adjudication is to determine whether a person meets eligibility requirements for the award of a government benefit, not to punish the person as a criminal. Garrett v. Lehman, 751 F.2d 997, 1002 (9th Cir. 1985). In absence of statutory authority, civil

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[Emphasis added].

adjudication is the sole function that the FCC should be allowed to perform. See Jalas, 409 F.2d at 360-361.

In the instant case, the FCC has combined civil adjudicatory and criminal investigatory functions without any authority or guidance from Congress.[5] The Communications Act of 1934, as amended, is silent regarding the FCC's authority to perform such functions. See 47 U.S.C. §301 et seq. (1993). Statutory authorization for the combination of functions, the foundation of the Court's decisions in Withrow and LaSalle, is

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[5] In determining whether bias exists in adjudication, unrebutted allegations support that it does exist. Buffalino v. Kennedy, 322 F.2d 1016, 1018 (D.C. Cir. 1963); Fitzgerald v. Hampton, 467 F.2d 755, 768-769 (D.C. Cir. 1972). The FCC at no point denied being engaged in a criminal action which targeted Appellants, thus demonstrating that the FCC combined its civil adjudicatory function with criminal investigative and prosecutorial functions in Appellants' cases.

absent in Petitioners' cases.

The absence of statutory guidance directing the FCC how to use criminal investigative power creates an intolerable risk of bias in Petitioners' cases, in turn resulting in a violation of Petitioners' Fifth Amendment right of procedural due process. It should be left to Congress to decide the circumstances and procedures under which the FCC may participate in criminal investigations and prosecutions during the pendency of a civil adjudication, or whether the FCC should perform such a function at all. Until that time, this Court should find that the FCC's performance of criminal investigative functions creates such a risk of bias in its adjudicative decisions that the procedural due process protection of the Fifth Amendment is not satisfied.

III. The FCC's classification of Petitioners as an "Application Mill" violates Petitioners' right of Equal Protection.

Although the Fourteenth Amendment's equal protection clause does not apply directly to actions taken by the federal government, the Fifth amendment embodies equal protection principles and is applicable to the federal government. Bulluck v. Washington, 468 F.2d 1096, 1100 n.9 (D.C.Cir. 1972).

It is well established that selectivity of enforcement violates equal protection when it is deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification. Oyler v. Boyles, 368 U.S. 448, 456 (1962).

The instant case presents an invidious form of discrimination against Petitioners. Without any authority from

Congress, the FCC's decision-makers at every level have carved out a special category of applicant for differential treatment: an applicant that files through an "application mill." Based on this special category, the FCC has arbitrarily applied its rules and selectively sought enforcement of criminal laws against the Petitioners.

The FCC has never defined an "application mill." The FCC has arbitrarily created a classification and decided to use virtually any means it can get away with to eliminate applicants falling within that classification, even if it takes criminal investigation and prosecution while the FCC is still in the process of adjudicating their

applications.[6]

The FCC cannot deny that it has classified the Petitioners as part of an "application mill." On November 18, 1993, the FCC issued a News Release announcing the lower court's decision to grant the FCC's motion to dismiss in this case. The News Release equates the dismissal of the Petitioners applications with the FCC's effort to eliminate "application mills." Clearly, the classification exists. More importantly, the classification is not rationally related to a legitimate governmental

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[6] Although different kinds of "race" and "religion" may be defined, the classification of persons according to such definitions in particular contexts may be arbitrary and unconstitutional. In contrast, "Application 'Mills'" may not even be subject to <u>any</u> meaningful definition, making any classification according to that term arbitrary and unconstitutional per se.

interest.

Congress has not authorized such discrimination. Indeed, because Congress has not even addressed "application mills" by legislation, the FCC has an even greater burden in justifying its discrimination in Petitioners' cases.

The FCC offered no reason for finding that "Application 'Mills'" should be eliminated. Instead, the agency has relied entirely upon its own desire to do so. Without more, the Petitioners have, by the FCC's dismissal of their applications, been deprived of their rights under the Fifth Amendment to the Constitution.

IV. Petitioners should not be required to exhaust administrative remedies when the FCC violates the Petitioners' constitutional rights of procedural due process and equal protection.

An exception to the requirement of

exhaustion of administrative remedies exists where an agency has very clearly violated an important constitutional or statutory right. Fitzgerald v. Hampton, 467 F.2d 755, 768 (D.C.Cir. 1972). Court intervention prior to completion of the agency proceeding is justified if a procedural infirmity exists which is "fundamental." Id. at 768-769. Further, a party need not await a final agency decision if the preliminary agency action clearly and unambiguously violates statutory or constitutional rights. Gibson v. Berryhill, 411 U.S. 564, 768 (1973). The purposes of exhaustion are not served where something has gone "fundamentally awry" with the way in which the agency proceeding itself was being conducted. Gulf Oil Corp. v. United States Dept. of Energy, 663 F.2d 296, 306 (D.C.Cir. 1981).

The exhaustion requirement allows an agency to correct its own substantive mistakes. In Petitioners' cases, however, the mistakes lie in the nature of the agency's own process, and are of such a magnitude as to create a constitutionally intolerable structural flaw in that process. Petitioners were identified as potential criminals by the agency's designated authority in contacts with its superior authority. Those contacts were wholly outside the lawful procedures for a quasi-judicial civil adjudication which the designated authority and the superior authority were required to follow meticulously. From the moment the designated authority contacted the superior authority's Office of General Counsel and injected a criminal prosecution into a civil adjudication, constitutional review by

the superior authority became impossible. To require Petitioners to go before an agency already infected by bias would be to require them to pursue a constitutionally inadequate remedy.

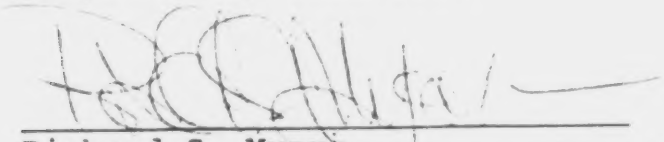
Further, Petitioners were placed into the classification of "application mill" contrary to their right of equal protection. The stigma attached to this classification by the FCC meant that further meaningful review at the agency was impossible.

Accordingly, the Petitioners have been subjected to two constitutional violations. Under these circumstances, exhaustion of administrative remedies should not be required, and the Petitioners should be allowed to argue the merits of their applications for radio station licenses before the Court of Appeals.

V. Conclusion.

For the foregoing reasons, the instant petition should be granted, and this Court should review the decision of the U.S. Court of Appeals for the District of Columbia which dismissed Petitioners' consolidated cases for lack of jurisdiction.

Respectfully submitted,



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(Admission Pending to the Bar of the Supreme Court)

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